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No. 834

Supreme Court of the United States

OCTOBER TERM, 1967

READING COMPANY,
Appellant

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF READING COMPANY

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Reading Company appeals from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellant's complaint insofar as it requested that certain orders of the Interstate Commerce Commission be modified so as to include provisions which will adequately protect Reading from the adverse effect of the merger of Pennsylvania Railroad Company and New York Central Railroad Company pending Reading's inclusion in a major railroad system. This Statement will show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are so substantial as to require plenary consideration.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Southern District of New York is not yet reported. A copy of the opinion is attached as Appendix B to the Jurisdictional Statement of appellants Baltimore and Ohio, et al. (Oct. Term 1967, No. 778), and reference is made thereto. An earlier decision of the same District Court denying an interlocutory injunction in this case, *Erie-Lackawanna R. Co.* v. *United States,* 259 F. Supp. 964 (S. D. N. Y. 1966), was reversed by the Supreme Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967). The report and order of the Interstate Commerce Commission dated June 9, 1967, issued subsequent to the remand from the District Court, are reported at 330 I. C. C. 328. The Commission previously issued reports and orders dated April 6, 1966, and September 16, 1966, disposing of substantive aspects of the merger transaction, which are reported at 327 I. C. C. 475 and 328 I. C. C. 304, respectively.

JURISDICTION

Reading Company brought this action under Title 5, U. S. C. § 1009, and Title 28, U. S. C. §§ 1336(a), 2284, and 2321 through 2325, to annul and set aside an order of the Interstate Commerce Commission dated April 6, 1966 (327 I. C. C. 475), as modified by the Commission's orders dated September 16, 1966 (328 I. C. C. 304) and June 9, 1967 (330 I. C. C. 328).

The order of the District Court dismissing the complaint was entered October 19, 1967. Notice of appeal was filed in that Court November 1, 1967. The jurisdiction of the Supreme Court to hear this appeal is conferred by Title 28, U. S. C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

Should the Commission be required to hear evidence, offered by a small railroad at the first opportunity, that its public transportation service will seriously deteriorate from heavy traffic losses caused by the merger of large competing railroads, when developments in the realignment of Eastern railroads, arising long after the commencement of the lengthy administrative proceedings, have prevented such small carrier from obtaining the protection which it had expected by timely inclusion in another major system?

Does a District Court have the right to sustain a ruling of the Commission on a different ground than that given by the Commission and to qualitatively evaluate and reject technical evidence which has not yet been considered by the Commission?

STATUTES INVOLVED

The statutes involved in this case are: Interstate Commerce Act, Section 5(2), 49 U. S. C. § 5(2); and Administrative Procedure Act, Sections 5(b), 7(c) and 10(e); 5 U. S. C. §§ 1004(b), 1006(c) and 1009(e). The relevant portions of the texts of these statutes are attached hereto as Appendix A.

STATEMENT

The sole objective of Reading in this appeal is to secure the opportunity, which the Commission so far has denied, to present evidence of the serious harm which Reading and its shippers will suffer from overpowering competition by the merged Penn-Central. The purpose of this excluded evidence is to obtain for Reading protective conditions similar to those in Appendix G which the Commission invented

to shield three other small railroads, E-L, D&H and B&M,* from Penn-Central, until they are taken into the economic shelter of a major rail system. Unless this is also done for Reading, the essential service provided by it to the public will deteriorate just as certainly as Reading's revenues will decline.

The relief which Reading seeks will not result in injustice to Penn-Central or to the other small railroads involved since Reading is not now seeking to have the merger postponed.

Reading operates a railroad system of 1,275 miles which provides daily commuter passenger service in the Philadelphia area and regular freight service in Eastern Pennsylvania, New Jersey and Delaware. As shown on the Map, Appendix B hereto, its lines are practically paralleled by those of PRR. Allentown and Bethlehem, Pa., are the only two communities of any size served by the Reading which are not also served by PRR; but even those two cities are served by a PRR subsidiary, Lehigh Valley. Of the fifty largest on-line customers of Reading there are only fourteen which are not also served by PRR or a subsidiary of PRR (Ex. No. FH48.) No other railroad will have more face-to-face competition with Penn-Central in its territory.

The extreme nature of the increased competition that Reading can expect from Penn-Central following the merger is best described in the Commission's own findings justifying the merger (327 I. C. C. at 491):

> "Shippers may expect numerous service advantages as a result of the merger. There will be single-line service between more points, with less route-circuity, less handling of freight, less switching

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*Abbreviations are those used in the Commission reports and the District Court opinions.

> of cars, and consequently less likelihood of damage, less time in transit and terminal, and easier tracing of shipments. Not only will applicants be able to offer shippers all the various kinds of equipment in their combined fleet, but also, by virtue of their monetary savings and improved financial situation as a result of the merger, they will be in a better position to augment the fleet with modern, more versatile and specialized equipment tailored to the specific needs of the shipping public. With this equipment more readily available across the merged systems and under unified control, applicants should be able to produce a more flexible car supply more closely attuned, time and location-wise, to the needs of commerce and industry in their area of service."

Despite this major competitive threat, Reading deliberately did not oppose the merger, nor did it originally offer evidence of the amount of traffic which it might expect to lose. Instead, it sought only imposition of the standard routing conditions which heretofore have been the usual protection accorded competing roads, and an order directing PRR to dispose of its holdings in N&W. It so limited its initial participation because it believed that the Eastern roads must merge to survive; that as a member of the C&O-B&O "family", it would soon be merged directly in that system;* and that then it would be able to compete effectively, with Penn-Central by offering the same or similar advantages in freight routing and facilities as Penn-Central. Reading did not foresee that later

*C&O controls B&O through ownership of more than 90% of its stock; B&O owns 38.22% of Reading's stock; and C&O has a right of first refusal to purchase an additional 10%. Reading controlled CNJ by ownership of almost 50% of its stock until CNJ went into reorganization on March 22, 1967.

C&O-B&O would develop a plan to merge into N&W which would indefinitely delay inclusion of Reading in a major system, or that the Commission would go so far as to order Penn-Central to guarantee the traffic and revenues of some small railroads while they were awaiting inclusion in a large system, as it did by imposing the Appendix G conditions.

The railroads that did introduce evidence of traffic diversion, such as B&M, EL and D&H, did so only in support of their petitions for inclusion in Penn-Central and not in anticipation of those conditions which, much to the surprise of everyone, finally emerged for the sole benefit of B&M, EL and D&H, the so-called "protected carriers".

Following that order, Reading petitioned to reopen the record so that it could introduce evidence of the amount of traffic that might be diverted by Penn-Central and asked that it also be considered a protected carrier if, after hearing, the Appendix G conditions were retained. It argued that it was surprised by the availability of such protective conditions, that contrary to its original expectations there was no immediate possibility of merger or even financial assistance for Reading, and that Reading could not withstand Penn-Central competition alone without such protection. It also asked that it be permitted to show the effects of the Appendix G conditions on it if it were not to be included as a protected carrier.

The Commission, in its order of September 16, 1966, denied Reading the right to show the diversionary effects of the merger on the ground that it was guilty of "laches" (328 I. C. C. 317-318). However, the Commission did order further hearings to consider modifications of Appendix G and to consider whether a form of capital loss indemnification should be imposed to compensate EL, B&M and D&H for any loss of capital value resulting from the Penn-Central merger (328 I. C. C. 327-328).

Reading* commenced this proceeding before the District Court to enjoin consummation of the merger until, *inter alia*, it had an opportunity to be heard concerning the competitive injury it would suffer if the merger were consummated. Reading's suit was only one of many appeals which sought to enjoin the merger. The District Court denied all motions for an injunction, and on appeal this Court reversed on the sole ground that it was necessary that the future of the three protected railroads and their inclusion in a major system be decided prior to consummation of the merger (386 U. S. at 390). This Court declared that it was not deciding "the peripheral points posed by the various parties" (p. 378). However, it was evident that this Court also expected that these points would either be eliminated by the course of action that was being prescribed or that the Commission itself would correct them. It was said (386 U. S. at 390):

> "Furthermore, the serious charge that the conditions of Appendix G were imposed without notice and hearing would in a large part be dissipated by this course of action. As to the three protected roads it would be entirely obviated if and when their fate is determined. *As to the other railroads affected,*

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*Reading and CNJ joined in the same complaint before the District Court (66 Civ. 2914) and in the brief filed in this Court by appellants B&O, et al. CNJ entered reorganization proceedings on March 22, 1967 in the United States District Court for the District of New Jersey (C. A. No. B401-67) under Section 77 of the Bankruptcy Act (11 U. S. C. § 205). The Court below granted CNJ's motion to suspend the pleading, briefing and argument schedule as to it and has not dismissed its complaint (B&O J. S. Ap. B-71). CNJ had represented that, because it was negotiating protection with Penn and Central, it would not seek a stay of the merger but reserved its right to litigate its request for protection if negotiations are unsuccessful. Reading is not seeking a stay of the merger and its position is identical to CNJ's except that it must advance this litigation because it has been unable to negotiate protection.

the Commission could more quickly conclude its present hearing and make a decision as to the effect of the merger upon them and the protection, if any, required. (Emphasis supplied)

At the continued hearings in the fall of 1966, which were held while the appeals to this Court were pending, the Examiner struck from the testimony of Reading's witness all references to the diversion of Reading traffic by reason of the merger, confining the testimony to possible diversion by reason of the Appendix G conditions (Ex. No. FH48, as marked). Despite the expectations of this Court that the Commission would make a decision as to the effect of the merger upon the unprotected roads, the Commission affirmed the Examiner's exclusion of Reading's evidence in its final order of June 12, 1967, saying that Reading "failed to present timely evidence of the impact of the Penn-Central merger." (330 I. C. C. at 356).

The evidence which was excluded would have shown that 19.9 million dollars of Reading freight revenues out of a total of only 91.8 million dollars of freight revenues, or more than 21%, is susceptible of diversion to Penn-Central (Ex. FH 48 at p. 8). The overwhelming importance to Reading of an exposure of this magnitude is self-evident from the fact that 1965 was the first year since 1960 that it had a profit. Its losses had been: 1961-$6,257,000; 1962-$4,917,000; 1963-$6,486,000; 1964-$5,396,000. In 1965 its profit amounted to $2,940,000; but in 1966 earnings dropped to $1,700,000; and for the first nine months of 1967 there has been a loss of $5,536,000. It is obvious that Reading cannot afford to lose another dollar of revenue.

On April 5, 1967 Reading had filed with the Commission at Finance Docket No. 23178 (a proceeding by C&O-B&O for control of WM) a petition for reconsideration

of the Commission's order of March 6, 1967* permitting C&O-B&O to control WM. The petition requests an order that C&O-B&O be required, as a condition to permitting such control, to render such support as may be required to keep Reading economically viable until it has been merged into C&O-B&O or one of the other major Eastern systems.

The petition, which is a part of the record in this appeal and is printed as Appendix C hereto, recites that Reading can no longer rely upon C&O-B&O for support in meeting the competition of Penn-Central since C&O-B&O has made it clear that Reading's only hope of merger lies in the so-called Dereco Plan, in which B&M, EL, D&H, Reading and CNJ would be included in N&W-C&O if the two latter companies are allowed to merge, and that Reading can expect no help from C&O-B&O in any other way. In the public announcement on August 31, 1965 of the proposed N&W-C&O merger, C&O-B&O said that there was no obligation to include Reading and CNJ in its system, and that acting alone C&O could not work out any practicable plan for their inclusion; in their brief in the *Inclusion Proceedings* C&O-B&O stated that consummation of the N&W-C&O merger and the Dereco Plan "offers the only solution to Reading-CNJ problems that can now be foreseen"; and in the testimony of the President of C&O-B&O in the N&W-C&O merger case he stated that the Penn-Central merger will seriously curtail, if not eliminate, the ability of C&O-B&O to provide any further assistance to Reading and CNJ. (App. C., pp. C-3-C-5). It was pointed out that the accuracy of those statements was confirmed by the fact that CNJ's financial condition did deteriorate to the point that CNJ had to initiate reorganization proceedings under Section 77 of the Bankruptcy Act on March 22, 1967. As was stated in

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**Chesapeake & Ohio Ry. Co.-Control-Western Maryland Ry. Co.*, 328 I. C. C. 684 (1967).

Reading's petition (Appendix C, p. C-9): "While Reading advocates the N&W-C&O System as a necessary counterweight to Penn-Central, and as the *only* solution proffered so far to Reading's own efforts so survive and grow, Reading cannot risk withdrawal, disapproval or even the time necessary for approval of the N&W-C&O proposal."

In a still further effort to obtain protection, on April 18, 1967 Reading filed a petition for consolidation for decision of the Penn-Central Merger case, the Inclusion Proceeding, the WM Control case and the N&W-C&O Merger case. It was alleged that consolidation for decision is the only effective method of achieving a final restructuring of the Eastern rail systems without seriously harming or even destroying one or more of the small roads.

The Commission has not yet acted upon Readings petition to obtain C&O-B&O financial responsibility in the WM Control case *although it was filed seven months ago,* and it has rejected Reading's petition for consolidation (330 I. C. C. 780, 792).

Following the Commission's order of June 12th, Reading filed a Supplemental Complaint in this proceeding, alleging as error, *inter alia,* the refusal of the Commission to hear and consider the evidence showing the disastrous effect of the merger on Reading and the approval of the merger without imposing for the benefit of Reading conditions similar to those in Appendix G pending inclusion of Reading in a major rail system.

The District Court dismissed the Complaint on the grounds, *inter alia,* that the Commission is not bound to reopen a proceeding "whenever management has a second thought", that it is hard to believe that B&O will actually let Reading "disappear", and that if Reading's other stockholders are injured by actions dictated by B&O "they are not without remedy." (B&O J. S. at B-21-22).

This appeal has followed, but Reading is not seeking to stay the Penn-Central merger in the expectation that this Court will direct that the protective indemnity condition, if any is found to be appropriate, be made retroactive to the date of the merger. Reading has always recognized that this merger as such is in the public interest and it believes that further proceedings with respect to its own problem can be concluded swiftly.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The questions presented on this appeal are so substantial as to require plenary consideration by this Court because they raise serious issues concerning the Commission's performance of its statutory duties in approving the largest railroad merger in history.

The Commission has been unwilling to allow consummation of the merger unless the merged company agrees to comply with the extraordinary conditions which it has devised for the protection of all affected small railroads, except Reading and CNJ, prior to their inclusion in a major system. Because Penn-Central is now negotiating to include CNJ in its system under certain conditions, Reading, alone among small Eastern railroads, is without any assurance as to its ultimate fate.

Appellant provides rail service to thousands of passengers in suburban Philadelphia and to shippers in the key metropolitan centers in Eastern Pennsylvania, New Jersey and Delaware. At virtually all points, it will compete directly with the enlarged and modernized freight service which will be provided by Penn-Central. Substantial deterioration of Reading's service through loss of business to Penn-Central—let alone its "disappearance"—would alter the quality and nature of the system of transportation

available to important segments of the public. The questions at issue on this appeal bear significantly on the future of that service.

The rejection of the evidence that would disclose this effect upon the public service, and provide a basis for according Reading protection similar to that afforded other small roads, raises substantial questions under the Interstate Commerce Act and the Administrative Procedure Act.

I. The District Court erred in upholding the Commission's refusal to consider the public's interest in the adequacy of Reading's service.

The Commission held that Reading is "bound" by its "original concession that the effect of the merger transaction (without the indemnity conditions) . . . would be inconsequential"* (330 I. C. C. at 357); and the District Court affirmed *inter alia* on the ground that the Commission is not "obliged to reopen a proceeding whenever management has a second thought" (B&O J. S. at B-21). Thus, both the Commission and the District Court would bind the public merely by the initial position assumed by a railroad at the beginning of a lengthy trial and without regard to intervening events.

The refusal to hear evidence concerning the effects of the Penn-Central merger upon Reading because it was not offered early in the proceedings constitutes a violation of

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*The Commission's reference to a "concession" is actually a reference to Reading's limited participation in the proceedings before the Commission in its initial stages. Reading originally announced on the record that it would be satisfied if it were protected by the standard protective conditions previously imposed by the Commission in similar cases and by a requirement that Penn divest its interest in N&W. It should be understood that Reading at no time said to the Commission or to anyone else that the merger's effects would be inconsequential.

the specific injunction of Section 5(2)(c) that the Commission give weight to "the effect of the transaction upon adequate transportation service to the public" and to "the effect upon the public interest of the . . . failure to include other railroads in the territory involved in the proposed transaction" (49 U. S. C. § 5(2)(c)). By rejecting this information, the Commission refused to consider whether the public in Reading's territory will be adequately served after this merger. Because of the same deficiency, the Commission is unable to fulfill the legislative policy whose end is the preservation of a national transportation *system* adequate to meet the commercial needs of the nation.

The clear statutory duty of the Commission is to consider the effects of this merger upon *every* railroad involved regardless of whatever position may be taken by the railroad on the record. This is an *affirmative* administrative duty—the Commission does not sit as a judge merely weighing the record made by the parties—it is a participant in the proceedings on behalf of the public and, far from rejecting the proffered evidence of harm to Reading's service, it should have insisted upon its production if it had not been offered. (See the thorough discussion of the Commission's duty in this respect in Mr. Justice Brennan's Concurring Opinion in *Baltimore & Ohio,* 386 U. S. at 427-430.)

The District Court's characterization of Reading's current position as a "second thought" supported by "evidence that had been available all along" not only ignores the public interest but incorrectly implies that Reading has been inconsistent (B&O J. S. at B-21). The participation of Reading throughout this proceeding has always been consistent with its view that protection from a merger so vast can only come from inclusion in a large system.

Before 1965 Reading had every reason to expect that the adverse effects of the Penn-Central merger on the pub-

lic served by Reading would be offset by its inclusion in C&O-B&O at or before the birth of Penn-Central. As the Commission has found, Reading is a "family line" of C&O-B&O. *Chesapeake & Ohio Ry. Co. and Baltimore & Ohio R. Co.—Control—Western Maryland Ry. Co.*, 328 I. C. C. 684, 706-708. Reading had long expected that in the restructuring of Eastern railroads it would be merged early into the B&O operation. A significant change, however, started to occur with the announcement on August 31, 1965 of the proposed N&W-C&O merger (Finance Docket No. 23832). This proposal contemplates the inclusion of Reading only as a part of a package consisting also of EL, D&H, B&M and CNJ, the Dereco Plan. The sense of insecurity which this announcement created increased when C&O-B&O representatives publicly stated in 1965 and 1966 that the Dereco Plan offers the only solution "to Reading problems"; that the Penn-Central merger would "seriously curtail, if not eliminate" C&O-B&O assistance to Reading; and that the N&W-C&O merger is essential "if there is to be any reasonable hope" of preserving Reading's service (App. C, at C-3-C-6). Any remaining hope of security because of a "family" relationship was dispelled by CNJ's bankruptcy.

It is now abundantly clear that C&O-B&O will not voluntarily include Reading in its system or render it financial assistance until there is a final decision in N&W-C&O which may be years away. Moreover, the Commission has failed to act on Reading's petition to compel C&O-B&O to keep it economically viable pending merger and has refused Reading's petition to consolidate all those proceedings for decision.

The District Court observed that B&O "naturally will do everything possible to exploit its lack of obligation to include Reading . . . to forward the N&W-C&O merger"

(B&O J. S. at B-22). The Court was not disturbed by what it perceived because of its confidence that Reading's independent stockholders could redress any resulting damage to their interests. But this case does not involve the rights of independent stockholders. The issues here concern the effect on the public interest if Reading's financial position so deteriorates from unrestrained Penn-Central competition that its service also deteriorates. Whatever remedies may be available to stockholders in judicial proceedings, it is only the Commission which can protect the public.

In rejecting Reading's position that the issues relevant to the public interest must be explored irrespective of private equities, the District Court accorded validity to the principle but would not sanction Reading's reliance upon it. The Court distinguished *Udall* v. *F. P. C.*, 387 U. S. 428 (1967), in which this Court refused to affirm a finding that a power project was in the public interest until all issues relevant to the public interest had been explored, even though advanced late in the proceedings, by noting that the Secretary of the Interior, who had not been heard, "is an especially important representative of the public" (B&O J. S. at B-21). This rationale makes consideration of the public interest dependent on the identity of the public advocate—a precondition not found in the Interstate Commerce Act. The matters to be tested by the Commission here are the effect upon the public interest of the merger's impact on Reading's service and of the non-inclusion of Reading in this or other merger transactions.

The District Court also would preclude Reading from a hearing here because it believes that Reading would offer evidence "available all along" (B&O J. S. at B-21). This view misconceives the significance of the evidence offered. It is true enough that Reading throughout these proceedings would have been able to prepare studies and submit evi-

dence as to the effects of the merger transaction. But such evidence would not then have been relevant since Reading did not seek inclusion in Penn-Central as did the other small railroads and it was unaware of the fact that the Commission would fashion special conditions to protect and indemnify small railroads pending inclusion in a large system. Since Reading has always believed that the public interest will be best served by its inclusion in C&O-B&O, it was not until it appeared that such inclusion could not occur until long after the onset of harm from Penn-Central and that the Commission would make extraordinary interim protection available to small railroads, that it became appropriate for Reading to prepare and offer the evidence.

The Commission's initial lack of concern as to the ability of Reading to meet Penn-Central competition may be explained by possible reliance on the historic B&O-Reading "family" relationship and the protective implications that might flow from that relationship. However, when the Commission was informed that C&O-B&O would not voluntarily keep Reading economically viable and that Reading would be included only at a distant time into the N&W-C&O system, and then merely as one of a group of five small roads, the Commission's duty to explore the consequences to Reading of the increased competition from the merger became clear.

II. By refusing the evidence of the effect of Penn-Central competition on Reading the Commission failed to perform its duty with respect to the antitrust laws.

In its original opinion the Commission correctly held that its duty is to estimate the effects of the merger on competition and to endeavor to accommodate the policies of the antitrust laws with the national transportation policy, citing

McLean Trucking Co. v. *United States,* 321 U. S. 67 (1943) and *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959) (327 I. C. C. at 508). In this connection it said that inquiry must be made into the effects of "the increased competition the strengthened applicants will be able to exert against their present real competitors, and even against their present connections." (327 I. C. C. at 510).*

Quite obviously this duty of the Commission to balance the transportation benefits of a merger against the tendency of the merger to create a monopoly in any geographic area by overpowering competition, such as in the territory served by Reading, cannot be satisfied by arguing that the relevant evidence was offered too late. Indeed, it can be contended with some force that the Commission should have insisted upon the production of just such evidence despite Reading's initial assumption that it too would soon be merged. See *Baltimore & Ohio,* 386 U. S. at 435-437 (concurring opinion).

The national transportation policy of strong unified railroad systems and the antitrust policy of multiple competitive units can be reconciled in the case of the Reading, just as in the case of B&M, E-L and D&H, by the imposition of protective conditions pending Reading's inclusion in a major system which is itself competitive.

III. The Commission erred in rejecting the proffered evidence on the ground of laches, and the District Court erred in affirming the Commission on grounds different from that relied upon by the Commission.

The Commission rejected Reading's request for a hearing to introduce evidence of traffic diversion in its orders of

*The anti-trust standards do not control the decision of the Commission. *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965).

September 16, 1966 on the ground that Reading was "guilty of laches" (328 I. C. C. at 316-318) and again in its order of June 9, 1967 on the ground that Reading was bound by its original failure to introduce such evidence (330 I. C. C. at 357, 360).

This was error in that rulings on matters of public importance must be justified by "more than procedural grounds". *Chicago & N.W. R. Co.* v. *A., T. & S.F. R. Co.*, 387 U. S. 326, 362 (1967). In that case, which involved divisions of joint rates on transcontinental freight traffic, this Court dealt with the difference between procedure and substance in the disposition of claims involving the public interest. For example, the Denver & Rio Grande belatedly claimed that it should receive separate treatment but the Commission held that it was estopped from so doing because of a prior position which the railroad had taken. This Court held that: "Of course the Commission could not simply rest on such notions of estoppel to justify infliction of substantial injury upon an important railroad serving the public." (387 U. S. at 365). Nor can the Commission in this case rely upon laches, a concept peculiar to the assertion of private rights, to justify the failure to protect the public served by an essential carrier.

The exclusion of relevant evidence can only be justified on the ground that no real injury to the public or a party has resulted therefrom. See, for example, *Pittsburgh Plate Glass Co.* v. *Nat. Labor Relations Bd.*, 313 U. S. 146 (1941); *Nat. Airlines, Inc.* v. *C. A. B.*, 321 F. 2d 380 (1963)

The District Court, perhaps in acknowledgment of the error made by the Commission, added what appeared to it to be substantive reasons; but in so doing it committed additional errors. The District Court expressed the opinion that it was "exceedingly hard to believe" that B&O would see

Reading "disappear"; it also argued that a letter from the President of Reading to the Commonwealth of Pennsylvania which had been introduced into evidence by the Commonwealth (Ex. H-109-A) supported "management's initial conclusion that the effect of the merger would be inconsequential" (B&O J. S. at B-21-22); and it even evaluated the rejected evidence and found it "scarcely persuasive" (Ibid).

A guiding principle of judicial review of administrative action is that the reviewing court must judge the propriety of the action solely on the grounds invoked by the agency. As this Court said in *S. E. C.* v. *Chenery Corporation,* 332 U. S. 194 (1947) to do otherwise "[w]ould propel the court into the domain which Congress has set aside exclusively for the administrative agency" (332 U. S. at 196). See also *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 168-169 (1962). The District Court has done just that.

Any surmise by the District Court as to whether B&O will let Reading "disappear" finds no support in the Commission's report, and certainly not in the evidentiary record. Indeed Reading has asked the Commission to determine, after hearing, that C&O-B&O must protect Reading from the competitive threat ahead. *Western Maryland Control* (Appendix C hereto). But C&O-B&O has vigorously opposed this request and the Commission has not yet acted. Therefore Reading has no assurance of protection other than the District Court's guess.

The letter to the Commonwealth of Pennsylvania, which the District Court regarded as proof that the effect of the merger upon Reading would be inconsequential, was not so evaluated by the Commission. Instead the Commission adopted the Examiners' finding that there was "no way of assessing" the effect of the merger on Reading (327 I. C. C. at 481-82, Examiners' report at 302).

Likewise, the District Court overstepped its power in evaluating the diversion study. The persuasiveness of Reading's study is, under the statutory scheme, to be determined in the first instance by a body having intimate knowledge of the intricate rail transportation complex. The function of the appellate court is limited to a review of the agency determination by application of the normal judicial standards (5 U. S. C. § 1009(e)) which do not include the weighing of evidence within the expertise of the agency. See *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U. S. 57, 69 (1966).

An interpretation of a diversion study is a matter pecularily appropriate for the application of the Commission's expert judgment. Evaluation of such evidence involves much more than numerical computations. Nothing demonstrates this more clearly than the Commission's imposition of the Appendix G conditions for E-L and B&M notwithstanding its adoption of findings by the Hearing Examiners that E-L's estimates of diversion were "highly exaggerated, and lack the specific underlying detail necessary for complete evaluation" (p. 374), and that B&M's study "lacks the specifics necessary for us to make an intelligent appraisal", and "is wholly inadequate and founded on unrealistic assumptions and premises" (p. 360). In other words, although the diversion studies of E-L and B&M were unpersuasive, the Commission was convinced that those roads needed unprecedented protection. The Commission manifestly relied on its expert knowledge of rail competition when, despite the unconvincing studies of E-L and B&M, it concluded that it had seen enough to know that the merger would be totally disruptive to small, independent, competitive railroads. The lack of any challenge to the Commission's judgment demonstrates its soundness.

With all deference to the judicial expertise of the District Court, the initial evalution of Reading's studies should

be reserved to the administrative expertise of the Commission. If the Commission does no more than apply the same reasoning process to Reading's studies as it did to those submitted by E-L and B&M, it cannot fail to order protection for Reading.

Thus, the District Court has invaded the administrative field in disregard of both the law and the facts in an effort to find substantive grounds for the Commission's refusal, for purely procedural reasons, to hear evidence of public injury.

IV. Reading has been denied the full and fair administrative hearing required by law.

Since the proffered evidence as to traffic diversion is clearly relevant under the Interstate Commerce Act, both alone and in conjunction with the antitrust laws, the Commission's refusal to receive this evidence violated Sections 5(b) and 7(c) of the Administrative Procedure Act (5 U. S. C. §§ 1004(b) and 1006(c)) as well as Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. § 5(2)(b)).

The broad discretion conferred by Congress upon administrative agencies carries with it a corresponding obligation of strict adherence to due process. The breadth of an agency's discretion "places in a strong light the necessity of maintaining the essentials of a full and fair hearing". *Morgan* v. *United States,* 304 U. S. 1, 21 (1938).

When it excluded Reading's evidence, the Commission did not observe this standard. Rather, Reading has been continually confined within narrow procedural channels—in distinct contrast to the liberality of the Commission in its treatment of other small railroads affected by this merger. For illustration, when both protected and unprotected groups of carriers protested the imposition of the Appendix

G conditions without notice, the Commission held lengthy hearings on the conditions. The protected roads ultimately received "even stronger interim protection" (330 I. C. C. at 361), but Reading's proof was sharply proscribed and it was allowed to show only a relatively small part of the impact of the authorized transaction (*id.* at 357).

The Commission's denial of a hearing to Reading is also to be contrasted with the conditions imposed by the Commission for the Lehigh Valley Railroad, a subsidiary of PRR, notwithstanding its failure to participate in this or any other of the recent merger cases affecting Eastern railroads (327 I. C. C. at 554-55). Although this dissimilarity in the treatment of two small competing railroads affected by the merger was repeatedly called to the attention of the Commission and was also pointed out to the District Court, the Commission has not explained the distinction and the Court did not require it to do so.

Since the protection afforded by Appendix G in the Commission's report of April 6, 1966 (327 I. C. C. 475, 561) was unprecedented, Reading's plea to obtain that protection, made in its petition for reconsideration of that order, was timely and should have been granted. Cf. *Gilbertville Trucking Co.* v. *United States,* 371 U. S. 115, 130 (1962); *Silvano* v. *United States,* 119 F. Supp. 277 (W. D. Wash. 1954).

Even if Reading's attempt to be heard were—as it is not—a source of delay, administrative fairness requires a hearing. This Court, in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304-305, stated:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when

it has been reached with due submission to constitutional restraints. [Citing cases] Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. . . . The right to such a hearing is one of 'the rudiments of fair play' . . . . *There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored*" (Emphasis supplied)

In all events, the issue of delay has been mooted in this Court by Reading's willingness to be heard after consummation.

V. The District Court erred in affirming the Commission on the ground that the proceedings would have been delayed by granting Reading a hearing.

The District Court stated that "Administrative proceedings, especially of such complexity as this, would never end if parties remained free to take new positions at any time and seek to support them with evidence that had been available all along." (B&O J. S. B-21).

The statement as a generality is, of course, valid and has much to commend it. As already pointed out, however, this is not a case of the whimsical or dilatory adoption by Reading of a new attitude toward the merger. Nor is it a case where justice would be delayed by the grant of a hearing.

The first opportunity for Reading to address itself to the Appendix G conditions was in its petition for reconsideration of the Commission's order of April 6, 1966, and it seasonably did so on June 30, 1966. Four months later the Commission began hearings on the capital loss indemnity issue and shortly thereafter on the Appendix G conditions. Although Reading offered to show the effects of the merger upon it on each of these occasions, the Commission refused to hear the evidence. Months later, in March 1967, Reading offered to show how Penn-Central would affect it at the hearings being held by the Commission to fix protective conditions for Reading and other roads by reason of the inclusion of New Haven in Penn-Central. That evidence was again refused by the Commission's hearing examiner even though by that time this Court had decided *Baltimore & Ohio* and had observed that the Commission would as a result of the remand "more quickly conclude its present hearing and make a decision as to the effect of the merger upon [the unprotected carriers] and the protection, if any, required" (386 U. S. at 390). Had the evidence proffered by Reading on any of these occasions been heard, the Commission's decision of June 9, 1967 need not have been delayed at all.*

Moreover, the Commission or the District Court could have directed the hearing and evaluation of the evidence without staying the merger. There would have been then, just as there is now, sufficient protection for Reading in such procedure if any indemnity provision is made retroactive to the date of the merger.

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*There have been 55 days of hearings since the Commission's order of April 6, 1966 first establishing Appendix G conditions.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted and the case set down for a full hearing on the merits.

Respectfully submitted,

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APPENDIX A

Pertinent Provisions of Section 5 of the Interstate Commerce Act (Title 49 U. S. C. § 5).

§ 5(2)(a), (b), (c) and (d)

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to

the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give

weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

Pertinent Provisions of the Administrative Procedure Act.

§ 5(b), 5 U.S.C. § 1004(b)

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 7(c), 5 U.S.C. § 1006(c)

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

* * *

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 10, 5 U.S.C. § 1009

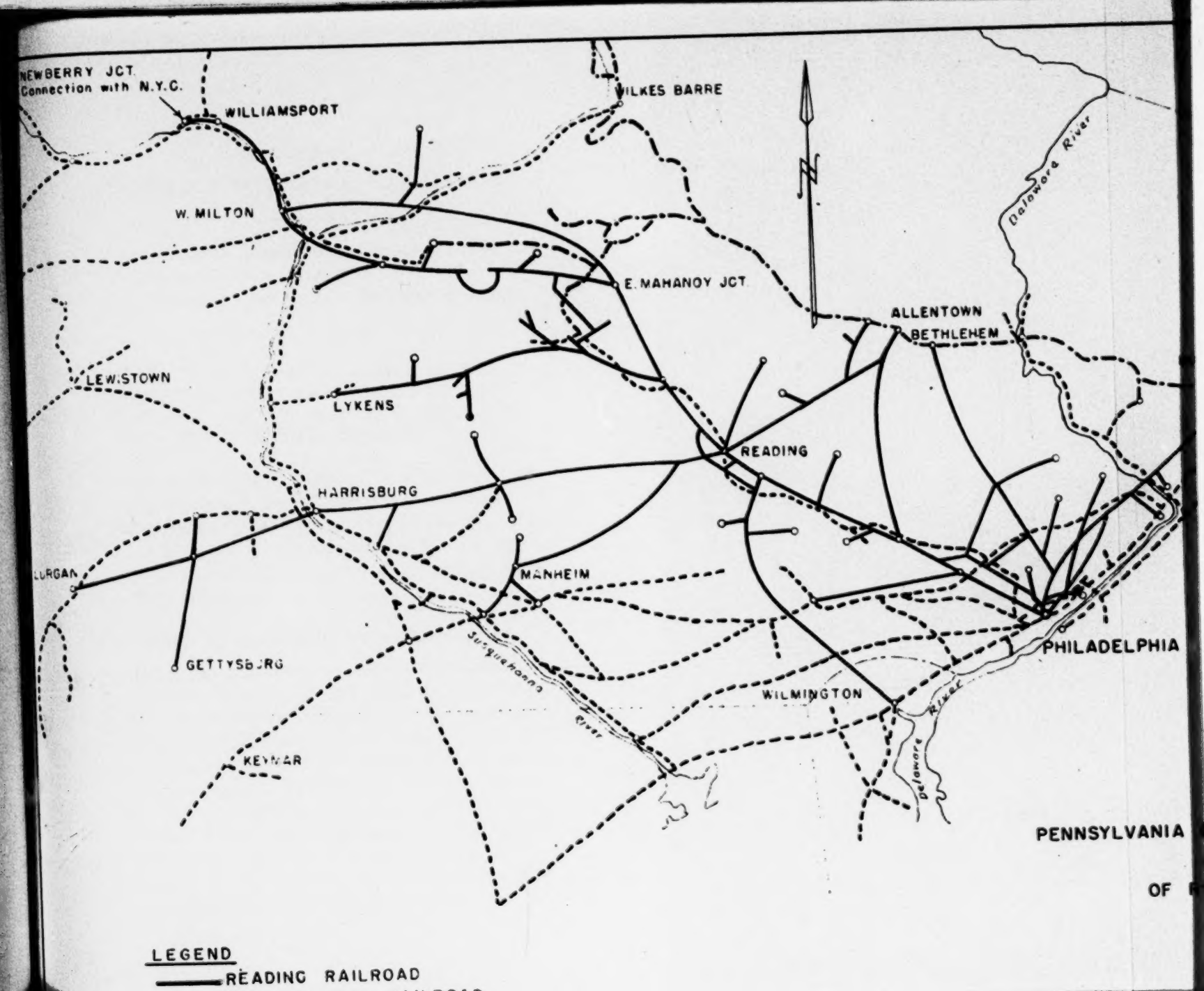
Judicial review of agency action

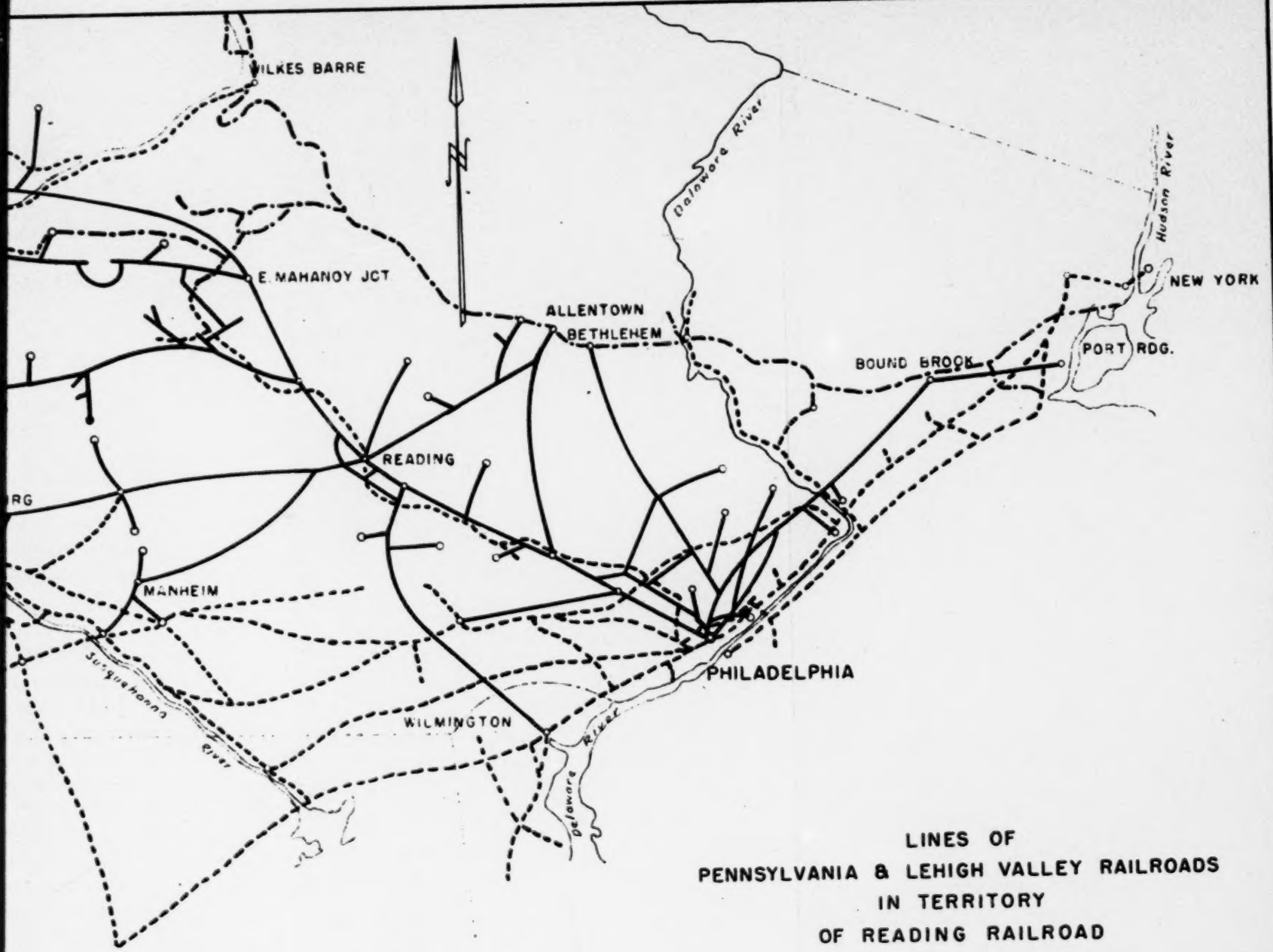
Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

* * *

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.


NEWBERRY JCT.
Connection with N.Y.C.
WILLIAMSPORT
WILKES BARRE
W. MILTON
E. MAHANOY JCT.
Delaware River
ALLENTOWN
BETHLEHEM
LEWISTOWN
LYKENS
READING
HARRISBURG
LURGAN
MANHEIM
PHILADELPHIA
GETTYSBURG
Susquehanna River
WILMINGTON
Delaware River
KEYMAR
PENNSYLVANIA
OF R
LEGEND
READING RAILROAD



LINES OF
PENNSYLVANIA & LEHIGH VALLEY RAILROADS
IN TERRITORY
OF READING RAILROAD

AD
AILROAD

APPENDIX C

BEFORE THE

INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY AND
BALTIMORE & OHIO RAILROAD COMPANY—
CONTROL—WESTERN MARYLAND RAILWAY COMPANY

Finance Docket No. 23178

PETITION OF READING COMPANY FOR RECONSIDERATION OF REPORT OF THE COMMISSION SERVED MARCH 6, 1967 AND FOR FURTHER HEARING

COMES NOW Reading Company ("Reading") and files this petition requesting the Commission to reconsider its Report dated February 21, 1967, and served March 6, 1967 (328 I.C.C. 684), and to schedule further hearing for the purposes herein described. In support of its request, Reading represents as follows:

I. The Position of Reading in These Proceedings

Reading is an intervenor in these proceedings and, prior to this time, has sought only the imposition by the Commission of conditions to approval of the application which would protect its routes and channels of trade. The traffic conditions imposed by the Commission in Appendices E and F to its Report of February 21, 1967 provide such protection. However, events which have transpired since the conclusion of hearings, some quite recently, compel Reading to seek the additional relief herein requested.

At the time of the hearings in this proceeding the Eastern railroad merger movement was proceeding on the

basis of three systems-C&O-B&O, N&W-Nickel Plate-Wabash and Penn-Central.* Reading and CNJ as well as the Western Maryland were considered to be "family lines" of the C&O and B&O which would be taken into that system. In fact in March 1963 B&O had retained independent consultants to study B&O-Reading-CNJ relations from an economic standpoint, with a view to bringing the relationship closer through merger, lease or stock control. Following completion of the traffic flow phase of this study, B&O acquired in October 1963 additional shares of Reading stock which increased its holdings from 42.6 percent of the total outstanding stock to just short of 50 percent. C&O-B&O also supplied Reading with a president, financial vice-president and operating officers to help restore the Reading to a profitable basis and qualify it for inclusion in the C&O-B&O System. Reading management believed that it could look to C&O and B&O for interim support and ultimate merger independently of C&O and B&O's relationship with any non-family lines.

II. Circumstances Have So Changed That the Present Relationship Between C&O-B&O and Reading Does Not Assure Reading's Viability.

C&O-B&O have continued their substantial ownership interest in Reading. B&O now owns 38.22 percent of Reading stock and C&O has a right of first refusal to purchase an additional amount approximating 10 percent. The other relationships between C&O-B&O and Reading are generally as described in the Report (328 I.C.C. at pp. 707-708), but none of the financial transactions has

*Unless otherwise indicated, abbreviations of railroads are those used in the Commission's Report.

involved "advances" by B&O to Reading or its affiliates, as the Report incorrectly states (*id.* at p. 708). B&O is also Reading's most important traffic connection and Western Maryland and Reading are mutually dependent on each other for traffic (*id.* at p. 700; Examiner's Report, sheet 30).

Notwithstanding the close relationship of C&O-B&O and Reading, and Reading's previous expectations, the following events make it plain that Reading cannot now rely upon C&O-B&O for the financial benefits and support it will need to compete with other large systems:

1. The announcement of the N&W-C&O merger proposal on August 31, 1965 not only advanced, for the first time, the suggestion for realigning the Eastern railroads on the basis of two systems—N&W-C&O and Penn-Central—but also gave, for the first time, an indication of a possible change in the role of Reading in the C&O-B&O System. C&O-B&O there stated:

> "The C&O indirectly has a substantial investment in the stock of both Reading and Central of New Jersey. But it has no obligation to include these railroads in its present system, and *acting alone it could not work out any practicable plan of inclusion which would be equitable to C&O security holders.*" (Emphasis supplied)

2. One year later in their brief dated September 19, 1966 in F.D. No. 21510, the so-called "inclusion proceeding", C&O-B&O stated (p. 7):

> "While both Reading and CNJ are affiliated through stock ownership with C&O-B&O and are vitally

important as railroad connections of C&O-B&O, C&O-B&O alone cannot solve the financial problems of the two affiliates (Tr. 1396-7; 1525). *Consummation of the N&W-C&O merger and the Dereco Plan offers the only solution to Reading-CNJ problems that can now be foreseen."* (Emphasis supplied)

3. Finally, on March 6, 1967 a Verified Statement of Mr. Gregory S. DeVine, President of C&O-B&O, was filed in the *N&W-C&O Merger* case, F.D. No. 23832, which stated (p. 13):

"Reading and CNJ are in real need of help. A Penn-Central merger will seriously curtail, if not eliminate, the ability of C&O-B&O to provide any further assistance to Reading and CNJ. At the same time it will greatly increase their need for help.

"* * *

"Even if the Western Maryland aspect of this problem were solved and C&O-B&O were empowered to control it, *it would be impossible to predict when, if ever, C&O-B&O could assist Reading and CNJ.* As the Commission knows, C&O has made a very large investment in B&O and has very important commitments to it. While C&O's investment in B&O has been an outstanding success, the amount of the investment has been large even for a financially strong C&O, and still further funds will be required. It has been our position that we could not, all other considerations apart, undertake signfi-

cant commitments for Reading and CNJ until our process of revitalizing B&O had been completed. [*]

"Given the facts of a Penn-Central merger, its overwhelming competitive strength, and the financial injury it will cause other Eastern railroads, including C&O, B&O and the family lines I have been discussing, *it becomes exceedingly difficult for C&O-B&O to provide future help for Reading and CNJ.*

"* * *

"* * * Just as N&W feels that it cannot alone bear the burden of supporting Erie-Lackawanna, Delaware & Hudson and Boston & Maine, *so C&O-B&O feel that they cannot alone bear the burden of of supporting Reading and CNJ.* Responsibility for the preservation of these five railroads should not not be divided, thus placing an added drain on the separate resources of N&W and C&O-B&O. *The strength of a merged C&O-N&W, and the anticipated merger and Dereco savings are essential if there is to be any reasonable hope of preserving the services these railroads provide the public."* (Emphasis supplied)

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*Reporting the annual stockholders' meeting of the C&O on March 31, 1967, *The New York Times* of April 1, 1967 stated at pages 35 and 44:

"As to the C&O's own plans for eventually merging with the Baltimore & Ohio Railroad, of which it now owns more than 90 percent, Mr. DeVine was most negative. 'There are no present plans for the B&O and C&O to merge,' he said.

"At a news conference following the meeting, Mr. DeVine explained that while such a merger is an eventual 'goal', early consolidation of the two railroads was out of the question."

Any remaining doubt as to the inability or unwillingness of C&O-B&O to assist Reading and CNJ is dispelled by the fact that on March 22, 1967, CNJ found it necessary to initiate reorganization proceedings pursuant to Section 77 of the Bankruptcy Act (11 U.S.C. §205) in the United States District Court for the District of New Jersey (No. B401-67). An order approving CNJ's petition under §77 was issued by the Court the same day.

III. Unless Appropriate Conditions are Imposed in This Proceeding, Reading May Be Unable to Survive.

A. The Penn-Central Merger Will Have a Serious Adverse Effect on Reading.

PRR is now the chief competitor of Reading. On the other hand, NYC is an important connection of Reading, both directly at Newberry Junction (Williamsport), Pa. and indirectly through NYC's subsidiary, P&LE, which participates in joint routes with Reading and Western Maryland. The Penn-Central merger will combine these two large systems and create "the largest railroad merger in our history". *B&O R. Co., et al.* v. *United States,* 35 LW 4271, 4277. It is to be expected that the merged Penn-Central will, wherever possible, solicit its longest haul, and that traffic now interchanged with Reading by NYC will in large measure be diverted from Reading to the lines of the merged company. In approving the Penn-Central merger, *Pennsylvania R. Co.-Merger-New York Central R. Co.,* 327 I.C.C. 475, 491, the Commission found:

> "Shippers may expect numerous service advantages as a result of the merger. There will be single-line service between more points, with less

route-circuitry, less handling of freight, less switching of cars, and consequently less likelihood of damage, less time in transit and terminal, and easier tracing of shipments."

The Commission went on to point out other advantages which Penn-Central will have such as a modern large car supply with versatile and specialized equipment. The superior service which the merged company will thus be able to provide will induce shippers to use Penn-Central whenever a choice of competing lines is available. The vast coverage of that system, as compared with the limited territory served by Reading, will place Reading at an overwhelming competitive disadvantage.

In the instant proceeding, the Commission recognized that "the rapidly changing railroad unification picture in the East" is a factor which "has a direct bearing upon Western Maryland's future strength and viability", 328 I.C.C. at p. 695. If this finding is true with respect to Western Maryland, it is *a fortiori* applicable to Reading. Not only would Penn-Central reach just about all the communities of any size which Reading serves, but, as compared with Western Maryland, Reading alone would be less able financially to encounter Penn-Central's competition.

Reading's net income declined from a high of $12 million in 1956 to a deficit which was as great as $6.4 million in 1963. In each of the years 1961 through 1964, Reading incurred a deficit, the smallest being a deficit of $4.9 million in 1962. Although in 1965 Reading experienced a vast improvement when it earned $2.9 million, as compared with a 1964 deficit of $5.3 million, Reading's results for 1966 showed a net income of only $1.7 million. In light

of Reading's prior deficits and its modest net income of recent years, it is manifest that unless Reading is able to obtain all the advantages which flow from its being a protected component of a large system, it will be exceedingly difficult for Reading to continue providing efficient transportation service once the benefits of the Penn-Central merger are realized.

B. The Commission Should Consider the Effect Upon the Public Interest of Inclusion or Non-Inclusion of Reading in the Transaction.

At the conclusion of its discussion concerning Reading and CNJ, the Commission found that B&O acquired control of Reading "alone, or in concert with" NYC before the Commission acquired jurisdiction under the Transportation Act of 1920 (328 I.C.C. at p. 708). While this finding is correct, it creates no responsibility in C&O-B&O to assure that Reading's transportation service will be preserved, particularly in the face of the increased competition to be expected from the Penn-Central merger or the inclusion of E-L, D&H and B&M in the present N&W.

Section 5(2)(c) of the Interstate Commerce Act (49 U.S.C. §5(2)(c)) requires the Commission to weigh "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction * * *." The Commission's finding that B&O controls Reading, without attaching any economic responsibility, does not satisfy this statutory standard.

The statutory phase "inclusion in the proposed transaction" is imprecise; and the argument may be advanced that Reading is included in the transaction by virtue of C&O-B&O's existing ownership of a controlling amount

of Reading stock. It is obvious, however, that Congress, in requiring the Commission to weigh the effect upon the public interest of the inclusion or non-inclusion of other railroads in the transaction, was not concerned so much with mere stock ownership as with responsible economic relationships which will assure the continuity and adequacy of the transportation services provided by carriers who are not parties to the originally proposed transaction. The events which we have listed earlier herein demonstrate that the stock control relationship with C&O-B&O will not, at least without further Commission action, provide Reading with the support it will need to continue essential transportation services for the indefinite future, particularly in the face of the Penn-Central merger.

The present posture of the Eastern railroad unification movement urgently requires Commission action in this proceeding to protect the public's interest in Reading's essential services until such time as Reading can be merged into C&O-B&O or some other major Eastern system. It is now too late to "save" CNJ without reorganization, and only if appropriate measures are adopted here will the public dependent upon Reading be sure of having available the "safe, adequate, economic and efficient service" contemplated by the National Transportation Policy (49 U.S.C. preceding §1).

Reading is mindful of the fact that N&W-C&O have expressed their willingness to include Reading in their proposed system as a part of the Dereco Plan. While Reading advocates the N&W-C&O System as a necessary counterweight to Penn-Central, and as the *only* solution proffered so far to Reading's own efforts to survive and grow, Reading cannot risk withdrawal, disapproval or even the time

necessary for approval of the N&W-C&O proposal.* In view of the Commission's limited power to *initiate* measures to assist Reading, this proceeding provides the Commission with its only opportunity to deal affirmatively with Reading's status now. C&O-B&O has made it clear that it will not voluntarily undertake "significant commitments" to Reading and CNJ until the "process of revitalizing" B&O has been completed.** C&O-B&O also has made it plain that the process will be a lengthy one. The Commission should not neglect this present, and possibly last, opportunity to secure the economic future of Reading and thereby assure the adequacy of its essential service.

In remanding the Penn-Central merger case to the Commission, the Supreme Court clearly held that "the inclusion proceedings" (Reopened F.D. No. 21510) must be concluded prior to consummation of Penn-Central. *B&O, et al.* v. *United States, supra,* 35 LW at p. 4273. Issues concerning the adverse effects of inclusion on Reading and other parties remain unresolved by the Court. But if the inclusion proceedings should result in the inclusion of E-L, D&H and B&M in the present N&W System, and Penn-Central is thereupon consummated, Reading will be the only railroad whose survival is in doubt, and the ability

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*N&W-C&O's offer to include E-L, D&H, B&M, Reading and CNJ in their proposed system is subject to a number of conditions including the condition that there be (joint application of N&W-C&O, F. D. No. 23832, p. 31):

> "(3) No substantial adverse change in the financial position of either Erie-Lackawanna, Boston & Maine, Reading, Jersey Central or Delaware & Hudson."

The CNJ's bankruptcy obviously, therefore, raises serious questions concerning the status of N&W-C&O's proposal with respect to all five of the lines proposed to be included in the transaction.

**Statement of Gregory S. DeVine, February 3, 1967, Exhibit No. A-3, as circularized March 6, 1967 in F. D. No. 23832, et al.

of CNJ to emerge from reorganization will be more questionable than ever.

Under all these circumstances the Commission should not permit the consummation of any further merger or control transaction until the preservation of the transportation service of Reading is assured by making it a protected component of a large system. To this end, it is Reading's intention to file with the Commission a petition for consolidation of all related Eastern railroad merger and control cases.

The public interest in a sound system of rail transportation necessitates an evaluation of a proposed rail consolidation with reference to its effect on railroads who are not parties to the transaction and to their future place in the national transportation scheme. As Justice Brennan said in his concurring opinion in *B&O, et al.* v. *United States, supra,* 35 LW at 4280:

> "[Section 5(2) of the Interstate Commerce Act and the National Transportation Policy] call for the application of discerning judgment to a wide range of factors, and preclude the position that the purpose of the 1940 Act is simply to promote railroad consolidation. [Footnote omitted] The ICC has recognized that inquiry into a proposed transaction does not end with the possibilities for increased economies, but extends to 'the effect of the transaction upon adequate transportation service to all parts of the public which would be so affected,' [cases cited in note omitted] which encompasses *the 'duty, as an administrative matter, to consider the effect of the merger* on competitors and *on the general competitive situation in the industry* in the light of the objectives of the National Transporta-

> tion Policy.' *McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 87. 'The public interest is the prime consideration and in making that determination *we must have regard for all relevant factors.' Toledo P. & W. R. Co.-Control,* 295 I.C.C. 523, 547." (Emphasis supplied)

The test is the same whether the transaction involves merger or, as in this case, control. This standard, when applied in the light of the present C&O-B&O attitude toward Reading, means that the Commission should decide whether conditions should be imposed to preserve the transportation service provided by Reading. In other words, the fact that the transportation service of Reading is jeopardized by the Penn-Central merger and other consolidations and the fact that this proceeding may offer the Commission its only effective opportunity to preserve transportation service for the public served by Reading, obligates the Commission now to decide whether further conditions should be imposed before permitting consummation of this transaction.

More specifically, the statutory requirement that the Commission give weight to the effect upon the public interest of the inclusion or non-inclusion of other railroads in the transaction now requires more of the Commission than what it has done on the present record. The effect of the Commission's finding of C&O-B&O stock control over Reading is inconclusive. When formal corporate alignments insufficiently assure attainment of the legislative objective, the Commission is not without means to fashion an appropriate remedy.

This case is necessarily related to other cases involving Eastern Railroads arising under Section 5(2) of the Act

and consideration of the effects of Reading's inclusion affects the time of consummation of this transaction. The Commission's power to impose conditions is broad and has been extensively employed in this and similar transactions. All indications now are that irrespective of whether Reading may be "included" in the C&O-B&O System, Reading's stock relationship to C&O-B&O will not assure its survival. In *Penn-Central,* the Commission recognized that a control relationship does not guarantee the survival of the subsidiary when it required Penn-Central to maintain its stock and other holdings in The Lehigh Valley Railroad Company and to "render such support, financial and otherwise, as the Commission from time to time, may determine necessary to keep such railroad operational." *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 327 I. C. C. 475, 555 (1966). We believe that the Commission ought to weigh now the possibility that Reading may not be able to survive without the aid of similar assurances.

Many of the facts and conclusions related herein, which make it clear that Reading does not have the support and future expectations which dictated its originally limited role in this proceeding, are not of record. They have occurred since the hearings closed, and indeed many have occurred only in the last few weeks. It is essential that a new hearing be held to make these facts and their consequences a matter of record so that the Commission may provide Reading with the present and future protection it needs.

V. Conclusion

Reading respectfully requests the Commission, after further hearing:

1. To find that the service provided by Reading is essential to the public;
2. To find that Reading cannot provide its essential services without aid from a major system, particularly if the Penn-Central merger is consummated;
3. To order that, as a condition to consummation of the transaction, applicants be required to render such support, financial and otherwise, as may be required from time to time to keep the Reading economically viable until Reading has been merged into C&O-B&O or one of the other major Eastern systems, or until further order of the Commission.

Pending the determination of such issues, we request that consummation of the transaction be deferred.

Respectfully submitted,

READING COMPANY

By .....

H. Merle Mulloy
William P. Quinn

Philadelphia, Pa.
April 5, 1967.